IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 1023 of 2005
To
CRIMINAL REVISION APPLICATION No. 1028 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE J.R.VORA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DR.M.AMIN HADMIDANI

Versus

PANKAJBHAI DHIRAJLAL VARIYA OFJUBILEE HOTEL PVT.LTD. & ANR

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Appearance :
MR CB GUPTA for Applicant
RULE SERVED for Respondent No.1
MR KC SHAH APP for Respondent No.2 - State
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CORAM : HONOURABLE MR.JUSTICE J.R.VORA

Date : 21/02/2006

ORAL JUDGMENT

1.Heard learned advocate Mr.C.B.Gupta for the applicant and learned APP Mr.K.C.Shah for the respondent No.2 – State of Gujarat. Rule is served to respondent No.1.

2.All these six Criminal Revision Applications are heard together as common question of law, as well as of fact, have arisen in all the Criminal Revision Applications wherein parties are also same.

3.Having seen the factual background, it appears that the present respondent No.1 filed criminal cases six in numbers in the Court of Chief Judicial Magistrate, Bhavnagar for the offence punishable under Section 138 of the Negotiable Instruments Act. On, all the six complaints being filed on 11.03.2004, learned 3rd Joint Civil Judge (S.D.) & J.M.F.C., Bhavnagar passed an order to register such complaints in Inquiry

Register kept for inquiries under Section 202 of the Code of Criminal Procedure and the complainant was directed to remain present on 29.03.2004 for the prima facie evidence. Thereafter, on 31.03.2004, learned Magistrate recorded verification of the complainant under Section 200 of the Code of Criminal Procedure and on the same day, an order came to be passed for de-listing the proceedings from Inquiry Register under Section 202 and further it was ordered that, the complaint be registered as criminal case and summons be issued against the present applicant in all cases, returnable on 30.04.2004.

4. Thereafter, in each of the criminal case, vide separate exhibits, the present applicant preferred applications that illegality has been committed by the learned Judicial Magistrate, firstly that no verification was recorded under Section 200 of the Code of Criminal Procedure, while learned Judicial Magistrate passed an

order in each complaint on 11.03.2004 directing inquiry under Section 202 of the Code of Criminal Procedure and secondly, ignoring such order passed on 11.03.2004 for conducting an inquiry under Section 202 of the Code of Criminal Procedure, suddenly after recording the verification of the complainant under Section 200 of the Code of Criminal Procedure, summons under Section 204 of the Code of Criminal Procedure came to be issued. It was, therefore, vide the above applications, submitted that not to record the plea of the accused and to remove the illegality committed, as aforesaid. Learned Magistrate, vide order dated 08.12.2005 rejected those applications and observed that no prejudice was caused to the accused, as the accused was not entitled, even otherwise, to participate in the proceedings before issuance of process and that if any lapse was committed, the same was curable irregularities and not illegalities,

learned Judicial Magistrate, First Class rejected each such application and hence, these Criminal Revisions Applications.

5.Learned advocate Mr.C.B. Gupta relying upon the decision of this Court in the matter of **VITHALBHAI J. PATEL Vs. STATE OF GUJARAT** decided on 06.02.1997 [Coram: Mr.Justice N.N.Mathur,J.] in Criminal Revision Application No.363 of 1996, submitted that the statement of the complaint under Section 200 of the Code of Criminal Procedure was required to be recorded and since in that particular case, without recording that verification, direction to forward the complaint for investigation to Executive Magistrate, was held ex-facie illegal. The order impugned in the said mater was set aside. It was, therefore, submitted by the learned advocate for the applicant that in the present case, after setting aside both the orders passed by the learned 3rd Joint Civil Judge (S.D.) & Judicial Magistrate, First

Class, Bhavnagar passed on 11.03.2004 and 31.03.2004. The matters be remanded to the Judicial Magistrate, First Class, Bhavnagar for proceeding further according to law, afresh.

6.Having heard learned counsels and learned APP, it appears that firstly, dealing with the first contention that whether non-recording of verification under Section 200 of the Code of Criminal Procedure would amount to illegality as to vitiate the proceedings it is necessary to resort to the decision of this Court, in the matter of **(M/S.) STEEL BUILD. Vs. (M/S.) K. MUKUND & CO.** as reported in **2002 (1) G.L.H., 608**, in which this Court took the view that not recording of verification of the complainant is not a defect to the extent of illegality and the same is simple curable irregularity. The order of process issued in pursuance of that, cannot be said to be bad unless gross miscarriage of justice and prejudice to the accused could be shown. In that particular

case, though before issuance of process, verification was recorded, but it was not signed, either by the complainant or by the concerned Magistrate amounting to no verification at all. The various views of various High Courts were recorded in the said decision. So, there is no substance in first contentions that the illegality is committed, while passing the order on 11.03.2004 by the learned Judicial Magistrate, First Class at Bhavnagar and it is clear that the object for making provision of recording of verification is to ascertain the fact constituting the offence and the prima facie case of the complainant. In law, it is not at all necessary that a written complaint should be preferred before the Magistrate. In such cases, when oral complaint is made, it is only by virtue of this provision of recording of verification, the Magistrate would know that what offence is committed and by whom, but in any case, non-

recording of verification in a given case and in given circumstances, as it is on hand, is not that illegality as to reverse the procedure right from recording of verification again by the learned Magistrate.

7. So far as the next contention is concerned, it is amply clear that there is no ban on the powers of the concerned Magistrate put by the Code, preventing him from closing of an inquiry under Section 202 at any stage and to issue process on satisfaction. Even without resorting to that inquiry, though it might have been directed, in proper cases, on satisfaction, Magistrate is not prevented by the Code to issue process under Section 204. This is so because at that juncture, the whole issue remains in the domain of the satisfaction of the Magistrate as to prima facie case. Therefore, it cannot be said that unless such inquiry is completed, no process can be issued. For these reasons such a situation is outside

the scope of the illegality. What has been done in this case, as it appears from the record that even after passing of the order to hold inquiry under Section 202, the Magistrate is satisfied about the prima facie case for issuance of process and, therefore, after verification recorded on 31.03.2004 issued process. Though the course adopted by the learned Magistrate is exceptional and irregular and should be avoided, but it cannot be said to be illegal to that extent as to quashing that procedure, the Magistrate be directed to adopt procedure afresh.

8. The decision cited of this Court in the matter of **VITHALBHAI J. PATEL Vs. STATE OF GUJARAT** (Supra) is not helpful to the applicant to the extent that it is not held in that decision that non-recording of verification by the Magistrate is an illegality as to vitiating of the whole proceedings. It appears that the investigation to be undertaken by Executive

Magistrate as directed by the learned Magistrate in that case was held ex-facie illegal.

9. The question in the cases at hand is whether after directing an inquiry under Section 202 of the Code of Criminal Procedure, Magistrate is empowered to close the said inquiry and pass orders for issuance of process after verification of the complainant. In my humble view no such illegality is committed as to interfere in the matter in this Criminal Revisions Applications. Even otherwise, before issuance of process, the accused cannot participate in the proceedings, though he cannot be prevented from challenging it, on the ground of causing prejudice to him or miscarriage of justice has occasioned. In the present cases, neither prejudice is caused to the accused nor any miscarriage of justice has occasioned.

10. In above view of the matter, all these

Criminal Revision Applications No.1023 to 1028 of 2005 stands dismissed. Rule issued in each Criminal Revision Application is discharged.

[J. R. VORA,J.]

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